stipulating that the maximum permitted laden weight of the lorry shall not exceed 215 cwts.

I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Lee Beng Cheang & Co.*

AHMAD BIN YAHAYA & ANOR. v. AHMAD BIN SULAIMAN

[A.C.J. (Syed Agil Barakbah J.) July 1, 1972]
[Alor Star — Civil Appeal No. 5 of 1972]

Practice and Procedure — Appeal — Granting leave to — Whether ignorance of procedure sufficient ground for — Mistake of law — Subordinate Courts Rules, 1950, O. 39 rr. 2 & 3 — Courts of Judicature Act, 1964, First Sch., items 8.

A mistake of law on the ground of ignorance of procedure is not sufficient ground for granting leave to serve notice of appeal out of time.

In this case the second appellant applied for an order that he be granted leave to serve a copy of the notice of appeal on the respondent notwithstanding that the time reserved to serve such copy had expired. The main ground for the application was ignorance of the procedural law. Apart from that, he believed that he had good grounds of appeal and that his appeal would probably be allowed.

Held: (1) ignorance of the procedural law does not constitute sufficient material upon which the judge could exercise his discretion:

(2) it was not enough merely to show that the proposed appeal had merits. It was also necessary to show that there were special grounds for the court to exercise its discretion.

Cases referred to:-

(1) *John Puddicombe Wilkins & 2 Ors.* v. *John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80.

(2) *D.C. Butler-Madden* v. *Krishnasamy* [1947] M.L.J. 182.

(3) *Re Coles and Ravenshear* [1907] 1 K.B. 1.

(4) *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1972] 1 M.L.J. 180.

(5) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 229, P.C.

(6) *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284.

(7) *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah* [1967] 2 M.L.J. 89.

MOTION.

Karpal Singh for the appellants.

E. Mayandi for the respondent.

Syed Agil Barakbah J.: This is an application by notice of motion by the second appellant for an order that he be granted leave to serve a copy of the notice of appeal on the respondent notwithstanding that the time reserved to serve such copy has expired.

Mr. Karpal Singh appeared for the appellants and Mr. Mayandi for the respondent.

The second appellant in his accompanying affidavit stated that on 14th February, 1972, judgment was given in the Sessions Court, Alor Star, in favour of the respondent (plaintiff) for vacant possession of a piece of land and for damages against him and the first appellant who was co-defendant in the said action. On 21st February, 1972, he despatched several copies of notice of appeal against the said decision to the Sessions Court, Alor Star. However, he did not serve a copy of such notice on the respondent or his solicitors. The reason for his failure was ignorance of procedural law. It appears that he was not represented by counsel in the court below and only engaged one for the purposes of the appeal. When his solicitors served the memorandum of retainer, memorandum and record of appeal, they were informed by the respondent's solicitors that notice of appeal had not been served on the respondent nor on them and that they would apply to the court for dismissal of the appeal before the hearing.

The procedure for filing notice of appeal against the decision of the sessions court, whether the whole or any part thereof, is governed by Order 39 rule 2 of the Subordinate Courts Rules, 1950. Rule 2(3) requires such notice to be filed within fourteen days from the day on which such decision was pronounced. Whereupon the court appealed from shall supply to the appellant a certified copy of the judgment or grounds of decision, as the case may be, on payment of the required fees. Sub-rule (6) requires such notice of appeal to be served by the appellant on all parties directly affected by the appeal or their respective solicitors.

Although no time limit within which the appellant has to serve a copy of such notice is expressly provided in sub-rule (6), by virtue of rule 3(1) of the same Order, it can safely be implied that the appellant has to do so within the same period as provided for filing such notice in the court appealed against, *i.e.* within fourteen days within which such decision was pronounced. That such is the intention of the legislature is clear because it is only after the appellant has complied with the requirements of rule 2 which includes sub-rule (6) that the court appealed against is bound to prepare all the necessary records as required under rule 3(1) after which notice that such records are ready will be served on the appellant by the said court.

A number of authorities were cited which in general requires the applicant to give special reasons to move the court to extend time in his favour.

In *John Puddicombe Wilkins & Two Others.* v. *John Patrick Kenelm Wilkins & Another,*(1) Thomson J. (as he then was) took the view that there must be special circumstances which would justify the court in granting the application sought. That was an application for leave to appeal out of time. In the course of his judgment, His Lordship discussed and applied the principle in the case of *D. C. Butler-Madden* v. *Krishnasamy,*(2) which in turn followed the principle laid down in the English Court of Appeal in *Re Coles and Ravenshear.*(3) It was held in that case that a mistake in law on the part of the appellant's legal advisers was not sufficient ground for granting special leave to appeal under R.S.C. Order 58 rule 15 as it stood prior to 1909. The principle was recently followed by the Federal Court in *Chong Kueng Ying & Ors.* v. *Lovis Lavagna.*(4) Suffian F.J. said:— "The law here, however, is the same as the pre-1909 English law: the mistake of a legal adviser is not a sufficient

ground for granting leave" to appeal out of time. In that case the applicants filed their notice of appeal within time but failed to serve a copy of it on the respondent in time. The matter is governed by rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules which requires special leave of the Federal Court. In the present case the matter is governed by item 8 of the First Schedule to the Courts of Judicature Act, 1964, which gives the High Court a discretion to enlarge or abridge the time.

Taking into consideration the relevant authorities applicable, I am of the view that the correct principle which applies to an application of this nature is as laid down by the Privy Council in *Ratnam* v. *Cumarasamy & Anor.*[5] Although it was concerned with Order 58 rule 22 of the Rules of the Supreme Court, it was dealing with an appeal from the order of the Court of Appeal dismissing an application for an order that the time for filing the record of appeal be extended. At page 229, thereof, Lord Guest says as follows: —

"The rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which such step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation...."

The main ground for the application as I have stated earlier is ignorance of the procedural law. The only material before me is the affidavit filed by the applicant who, apart from stating the ground mentioned above, believed that he has good grounds of appeal and that his appeal would probably be allowed by this court. In the first place, I do not consider ignorance of the procedural law to constitute sufficient material upon which I can exercise my discretion in his favour on the principle laid down in *Ratnam's* case. Secondly, it is not enough by merely showing that the proposed appeal has merits without also showing there are special grounds for the court to exercise its discretion. (See *Ramanath & Ors.* v. *Ban Tsan Chuan*[6]).

It is urged that the principle "rules of procedure should be the handmaiden not the master" as stated by Ismail Khan J. (as he then was) in *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah,*[7] should be the guiding line in a case of this nature. That was an application for an application for an order of *mandamus*. A preliminary objection was raised at the commencement of the proceedings relating to the procedure to be followed with regard to Order 53 of the Rules of the Supreme Court and Order 59 of the English Rules. The issue is therefore different from the present case where the rules to be applied are clear and mandatory.

For the reasons stated above, particularly the principle adopted by the Privy Council in *Ratnam's* case, I do not think that a mistake of the law on the ground of ignorance of procedure is sufficient ground for granting leave to serve notice of appeal out of time.

I therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Karpal Singh, Wong & Co.; Jayadeva & Zahir.*

M. Y. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.) July 6, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 121 of 1971]

Income Tax — Appeal — Determination of assessable income — Whether taxpayer was resident in Malaya — Whether temporary absences were reasonable and consistent with claim — Income Tax Ordinance, 1947, s. 2.

Income Tax — Review — Whether Court can review decision of Special Commissioners where conclusion improperly drawn.

This was an appeal from the decision of the High Court [1972] 1 M.L.J. 84.

The question for determination was whether the appellant was "resident" in the States of Malaya in the years 1966 and 1967 within the meaning of section 2 of the Income Tax Ordinance, 1947. He was in Malaya for 132 days in 1966 and 141 days in 1967, but was held not to have been a "resident". On appeal to the Federal Court,

Held, allowing the appeal: (1) the appellant was "resident" in Malaya in the years 1966 and 1967. His temporary absences were reasonable and not inconsistent with his claim to be resident in Malaya;

(2) on the whole of the evidence before them, the conclusion arrived at by the special commissioners could not be properly drawn. Thus, in those circumstances, it was open to the Federal Court, as well as the court below, to review the decision of the special commissioners;

(3) therefore, the deciding order of the special commissioners must be set aside and an order made that the respondent do amend the assessment of income tax of the appellant on the basis of his being resident in Malaya in those two years.

Cases referred to:-

(1) *Levene* v. *The Commissioners of Inland Revenue* 13 T.C. 486, 505; [1928] A.C. 217, H.L.

(2) *Lysaght* v. *The Commissioners of Inland Revenue* 13 T.C. 511; [1928] A.C. 234 H.L.

(3) *Commissioners of Inland Revenue* v. *Zorab* 11 T.C. 289, 291.

(4) *Cooper* v. *Cadwalader* 5 T.C. 101.

(5) *Loewenstein* v. *De Salis* 10 T.C. 424.

(6) *Kinloch* v. *The Commissioners of Inland Revenue* 14 T.C. 736.

(7) *Fox* v. *Stirk* [1970] 3 All E.R. 7, 11.

(8) *Robertson* v. *Federal Commissioner of Taxation* 57 C.L.R. 147, 164.

(9) *Gregory* v. *Deputy Federal Commissioner of Taxation* 57 C.L.R. 774, 778.

(10) *De Beers Consolidated Mines, Ltd.* v. *Howe* [1906] A.C. 455, 458.

(11) *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* [1929] A.C. 1.

(12) *Burrows* v. *Lang* [1901] 2 Ch. 502, 508.

FEDERAL COURT.

P. Mooney for the appellant.

Nik Saghir bin Mohamed Noor (Senior Federal Counsel) for the respondent.

Gill F.J.: The question for determination in this appeal is whether for purposes of income tax the appellant, M.Y., was "resident" in the States of Malaya in the years 1966 and 1967 within the meaning of that word in section 2 of the Income Tax Ordinance, 1947.

The Comptroller-General of Inland Revenue, who is the respondent to this appeal, answered the question in the negative when he assessed the appellant to